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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 UNITED STATES OF AMERICA,

4 v.

22 Cr. 192 (JSR)

5 MOISES FONTANEZ,

6 Defendant.

Plea

-----x

7
8 New York, N.Y.
November 10, 2022
9 3:09 p.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge

13 APPEARANCES

14 DAMIAN WILLIAMS

15 United States Attorney for the
Southern District of New York

16 BY: DOMINIC A. GENTILE, ESQ.
Assistant United States Attorney

17 LAW OFFICE OF EVAN L. LIPTON

18 Attorneys for Defendant

19 BY: EVAN L. LIPTON, ESQ.

20 ALSO PRESENT: JOSE LIZARDO, Detective, NYPD
21 ERIKA DE LOS RIOS, Interpreter (Spanish)
DAGOBERTO ORRANTIA, Interpreter (Spanish)

MBA1FONP

(Case called)

THE DEPUTY CLERK: Will everyone please be seated, and will the parties please identify themselves for the record.

MR. GENTILE: Good afternoon, your Honor. Dominic Gentile for the United States. Seated at counsel table with me is Detective José Lizardo of the NYPD.

MR. LIPTON: Good afternoon, your Honor. Evan Lipton on behalf of Moises Fontanez, who is seated beside me in court. I'd also like to note for the record that Mr. Fontanez's mother is here in the second row of the courtroom.

THE COURT: Very good.

So my understanding is that the defendant wishes to withdraw his previously entered plea of not guilty and enter a plea to the lesser included offense within Count Fourteen and to the offense within Count Fifteen; is that right?

MR. LIPTON: That is correct.

THE COURT: Place the defendant under oath.

THE DEPUTY CLERK: Please rise and raise your right hand.

(Defendant sworn)

THE DEPUTY CLERK: Please be seated.

MR. LIPTON: Your Honor, if I may clarify one thing. It's a lesser included in Count Fifteen as well.

THE COURT: Oh, I'm sorry. Thank you very much. Yes, that's right.

MBA1FONP

1 So Mr. Fontanez, let me first advise you that because
2 you're under oath, anything you say that is knowingly false
3 could subject you to punishment for perjury or obstruction of
4 justice or the making of false statements. Do you understand
5 that?

6 THE DEFENDANT: Yes.

7 THE COURT: So where are you from originally?

8 THE DEFENDANT: Dominican Republic.

9 THE COURT: Are you an American citizen?

10 THE DEFENDANT: No.

11 THE COURT: How old are you?

12 THE DEFENDANT: 22.

13 THE COURT: How far did you go in school?

14 THE DEFENDANT: 11th grade.

15 THE COURT: Now have you ever been treated by a
16 psychiatrist or psychologist?

17 THE DEFENDANT: Yes.

18 THE COURT: And without going into detail, what was
19 the general nature of that?

20 THE DEFENDANT: I don't remember.

21 THE COURT: When was this?

22 THE DEFENDANT: 2017, 2018.

23 THE COURT: And was this pursuant to a court order or
24 voluntary or what?

25 THE DEFENDANT: My probation sent me to a hospital.

MBA1FONP

1 THE COURT: Ah, I see. Have you ever been treated or
2 have you ever been hospitalized for any mental illness?

3 THE DEFENDANT: No.

4 THE COURT: Have you been treated or hospitalized for
5 alcoholism?

6 THE DEFENDANT: No.

7 THE COURT: Have you ever been treated or hospitalized
8 for drug addiction?

9 THE DEFENDANT: No.

10 THE COURT: Are you currently under the care of a
11 doctor for any reason?

12 THE DEFENDANT: Please repeat the question.

13 THE COURT: Yes. Are you currently under the care of
14 a physician for any reason whatsoever?

15 THE DEFENDANT: I'm recommended medication for being
16 bipolar.

17 THE COURT: Okay. And are you taking that medication?

18 THE DEFENDANT: Yes.

19 THE COURT: And is there any other medication you're
20 taking?

21 THE DEFENDANT: No.

22 THE COURT: And the medication you're taking, does
23 that in any way affect your ability to understand these
24 proceedings?

25 THE DEFENDANT: No.

MBA1FONP

1 THE COURT: Is your mind clear today?

2 THE DEFENDANT: Yes.

3 THE COURT: And do you understand these proceedings?

4 THE DEFENDANT: Yes.

5 THE COURT: On the basis of the defendant's responses
6 to my questions and my observations of his demeanor, I find he
7 is fully competent to enter an informed plea at this time.

8 Now, Mr. Fontanez, you have a right to be represented
9 by counsel at every stage of these proceedings. Do you
10 understand that?

11 THE DEFENDANT: Yes.

12 THE COURT: And if at any time you can't afford
13 counsel, the Court will appoint one to represent you free of
14 charge throughout the proceedings. Do you understand that?

15 THE DEFENDANT: Yes.

16 THE COURT: Mr. Lipton, are you appointed or retained?

17 MR. LIPTON: I'm appointed.

18 THE COURT: Mr. Fontanez, are you satisfied with
19 Mr. Lipton's representation of you?

20 THE DEFENDANT: Yes.

21 THE COURT: Have you had a full opportunity to discuss
22 this matter with him?

23 THE DEFENDANT: Yes.

24 THE COURT: And have you told him everything you know
25 about this matter?

MBA1FONP

1 THE DEFENDANT: Yes.

2 THE COURT: Now you previously entered a plea of not
3 guilty to the charges, and you can still go to trial, but I
4 understand you wish to plead guilty to the lesser included
5 offenses within Counts Fourteen and Fifteen; is that right?

6 THE DEFENDANT: Yes.

7 THE COURT: Before I can accept any plea of guilty, I
8 need to make certain, among other things, that you understand
9 the rights that you will be giving up. So I want to go over
10 with you now the rights that you will be giving up. Do you
11 understand that?

12 THE DEFENDANT: Yes.

13 THE COURT: And first, you have a right to a speedy
14 and a public trial by a jury on the charges against you. Do
15 you understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: And second, if there were a trial, you
18 would be presumed innocent, and the government would be
19 required to prove your guilt beyond a reasonable doubt before
20 you could be convicted of any charge. Do you understand that?

21 THE DEFENDANT: Yes.

22 THE COURT: Third, at the trial, you'd have the right
23 to be represented by counsel, and once again, if you still
24 cannot afford counsel, I would continue the representation of
25 you by Mr. Lipton free of charge throughout the trial and all

MBA1FONP

1 other proceedings. Do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: Fourth, at the trial, you would have the
4 right to see and hear all of the witnesses against you, and
5 your attorney could cross-examine the government's witnesses
6 and object to the government's evidence, and could offer
7 evidence on your own behalf if you so desired, and could have
8 subpoenas issued to compel the attendance of witnesses and
9 other evidence on your behalf. Do you understand all that?

10 THE DEFENDANT: Yes.

11 THE COURT: And fifth, at the trial, you would have
12 the right to testify if you wanted to, but no one could force
13 you to testify if you did not want to. And no suggestion of
14 guilt could be drawn against you simply because you chose not
15 to testify. Do you understand that?

16 THE DEFENDANT: Yes.

17 THE COURT: And finally, if you were convicted of one
18 or more charges, you would have the right to appeal your
19 conviction. Do you understand that?

20 THE DEFENDANT: Yes.

21 THE COURT: Now, Mr. Fontanez, do you understand that
22 if you plead guilty, you will be giving up each and every one
23 of those rights we've just discussed? Do you understand that?

24 THE DEFENDANT: Yes.

25 THE COURT: Very good.

MBA1FONP

1 Now does defense counsel want Counts Fourteen and
2 Fifteen read again here in open court or do you waive the
3 public reading?

4 MR. LIPTON: So waived.

5 THE COURT: And Mr. Fontanez, you've gone over those
6 charges with your attorney, yes?

7 THE DEFENDANT: Yes.

8 THE COURT: And you understand the charges against you
9 that you will be pleading guilty to?

10 THE DEFENDANT: Yes.

11 THE COURT: Now under the lesser included offense
12 within Count Fourteen--namely, participating in a conspiracy to
13 distribute and possess with intent to distribute mixtures and
14 substances containing a detectable amount, any amount, of
15 heroin, under that lesser included offense, you face a maximum
16 term of 20 years' imprisonment, to be followed by up to
17 lifetime supervised release to follow any imprisonment, with a
18 mandatory minimum of three years' supervised release, plus a
19 maximum fine of whichever is greatest, either \$1 million or
20 twice the amount of money derived from the conspiracy or twice
21 the loss to victims of the conspiracy, plus a \$100 mandatory
22 special assessment. Do you understand those are the maximum
23 and mandatory minimum punishments you face if you plead guilty
24 to the lesser included offense within Count Fourteen?

25 THE DEFENDANT: Yes.

MBA1FONP

1 THE COURT: With respect to Count Fifteen, under the
2 terms of your agreement, the government will accept a guilty
3 plea to the lesser included offense of knowingly using and
4 carrying firearms during and in relation to, and possessing
5 firearms in furtherance of, the drug conspiracy alleged in
6 Count Fourteen, which firearms were brandished, and/or that you
7 aided and abetted others to do that. And this lesser included
8 offense carries a maximum term of lifetime imprisonment, plus a
9 mandatory minimum of seven years' imprisonment, which must run
10 consecutive to any other term of imprisonment I impose, plus up
11 to five years' supervised release to follow any imprisonment,
12 plus a fine of whichever is greatest, either \$250,000 or twice
13 the gross gain or twice the gross loss, plus a mandatory \$100
14 special assessment. Do you understand those are the maximum
15 and mandatory minimum punishments under the lesser included
16 offense of Count Fifteen?

17 THE DEFENDANT: Yes.

18 THE COURT: And do you understand that if you plead
19 guilty, those two sentences could be added together so that you
20 would face up to lifetime imprisonment on the second count to
21 follow whatever imprisonment was on the first count? Do you
22 understand that?

23 THE DEFENDANT: Yes.

24 THE COURT: Now of course at this time I have no idea
25 what sentence I will impose, other than the mandatory minimums,

MBA1FONP

1 but one of the things I will look at are the federal
2 guidelines, which are certain laws that are not binding on the
3 Court but that recommend a proposed sentence. Have you gone
4 over the guidelines with your lawyer?

5 THE DEFENDANT: Yes.

6 THE COURT: And in that connection, I've been
7 furnished with a letter agreement, which we will now mark as
8 Court Exhibit 1 to today's proceeding, and which takes the form
9 of a letter dated October 14, 2022, from the government to
10 defense counsel. It appears, Mr. Fontanez, that you signed it
11 earlier today; is that right?

12 THE DEFENDANT: Yes.

13 THE COURT: And before signing it, was it read to you
14 in Spanish?

15 THE DEFENDANT: No.

16 THE COURT: Okay.

17 MR. LIPTON: It was summarized for him.

18 THE COURT: Well, no, no.

19 MR. LIPTON: Let me clarify. I communicate with
20 Mr. Fontanez in both English and Spanish. I've had meetings
21 with him, many meetings, where I speak with him in English. I
22 have --

23 THE COURT: Can he read English?

24 MR. LIPTON: Can he read English? He can read
25 English.

MBA1FONP

1 THE COURT: Did he read this agreement?

2 MR. LIPTON: He's had the opportunity to read it.

3 THE COURT: No, that's not my question.

4 MR. LIPTON: I cannot tell you whether he's read every
5 word of it. What I can tell you is that in both English and
6 Spanish, I've gone through each paragraph of it with him and
7 explained it to him.

8 THE COURT: I'm sorry. That's very good and
9 commendable, but that doesn't satisfy the law. So we will take
10 a five-minute break while -- which is he more familiar with,
11 English or Spanish?

12 MR. LIPTON: Spanish.

13 THE COURT: Then the interpreter will read him word
14 for word the letter agreement, and then I'll come back on the
15 bench.

16 MR. LIPTON: That may take a bit longer than five
17 minutes.

18 THE COURT: Well, my time is yours.

19 MR. LIPTON: Okay. I'd ask for ten to fifteen
20 minutes.

21 THE DEPUTY CLERK: All rise.

22 (Recess)

23 (In open court)

24 THE COURT: So Mr. Fontanez, have you now had the
25 letter agreement read to you in Spanish?

MBA1FONP

1 THE DEFENDANT: Yes.

2 THE COURT: And do you understand its terms?

3 THE DEFENDANT: Yes.

4 THE COURT: And do you agree to its terms?

5 THE DEFENDANT: Yes.

6 THE COURT: And do you reaffirm the signature that you
7 put on that letter that we've previously marked as Court
8 Exhibit 1, the letter that you signed earlier today?

9 THE DEFENDANT: Yes.

10 THE COURT: All right. Now this letter agreement is
11 binding between you and the government, but it is not binding
12 on me. For example, with respect to the sentencing guidelines,
13 this letter says that you and the government have agreed that
14 the guideline range for Count Fourteen is 70 to 87 months'
15 imprisonment, with a mandatory minimum, under Count Fifteen, of
16 84 months' imprisonment, so that the total guideline range is
17 154 to 171 months' imprisonment. Do you understand that that
18 is the guideline range that you and the government have agreed
19 to?

20 THE DEFENDANT: Yes.

21 THE COURT: Now because none of this is binding on me,
22 I may agree with that calculation, I may disagree with that
23 calculation. Even if I agree with that calculation, I may
24 sentence you to more or less or anywhere in between, and
25 regardless of where I come out, if you plead guilty, you will

MBA1FONP

1 still be bound by my sentence. Do you understand that?

2 THE DEFENDANT: Yes.

3 THE COURT: More generally, do you understand that if
4 anyone has made any kind of promise or prediction or estimate
5 or representation to you of what your sentence will be in this
6 case, that person could be wrong, and nevertheless, if you
7 plead guilty, you will still be bound by my sentence? Do you
8 understand that?

9 THE DEFENDANT: Yes.

10 THE COURT: Does the government represent that this
11 letter agreement that we've now marked as Court Exhibit 1 is
12 the entirety of any and all agreements between the government
13 and Mr. Fontanez?

14 MR. GENTILE: It does, your Honor.

15 THE COURT: Does defense counsel confirm that is
16 correct?

17 MR. LIPTON: Yes.

18 THE COURT: And Mr. Fontanez, do you confirm that is
19 correct?

20 THE DEFENDANT: Yes.

21 THE COURT: Mr. Fontanez, other than the government,
22 has anyone else made any kind of promise to you or offered you
23 any inducement to get you to plead guilty?

24 THE DEFENDANT: No.

25 THE COURT: Has anyone threatened or coerced you in

MBA1FONP

1 any way to get you to plead guilty?

2 THE DEFENDANT: No.

3 THE COURT: Does the government represent that if this
4 case were to go to trial, it could, through competent evidence,
5 prove every essential element of each of these charges beyond a
6 reasonable doubt?

7 MR. GENTILE: It does, your Honor.

8 THE COURT: Does defense counsel know of any valid
9 defense that would likely prevail at trial or any other reason
10 why his client should not plead guilty?

11 MR. LIPTON: After a thorough review of the indictment
12 and the discovery, I know of no such reason.

13 THE COURT: Very good.

14 So Mr. Fontanez, tell me in your own words what it is
15 that you did that makes you guilty of these two charges.

16 MR. LIPTON: Your Honor, Mr. Fontanez and myself have
17 collaborated on a written statement that was then translated
18 into Spanish, and he is going to read that.

19 THE COURT: All right. That's fine.

20 THE DEFENDANT: Count Fourteen. From May 17 to March
21 2022, I agreed with others to sell heroin in the Bronx, New
22 York. I knew this was illegal when I did it.

23 Count Fifteen. While engaged in the conspiracy in
24 Count Fourteen, I drove a scooter, knowing that my passenger
25 was carrying and would brandish a gun.

MBA1FONP

1 THE COURT: And the passenger was part of the
2 conspiracy, yes?

3 THE DEFENDANT: Yes.

4 THE COURT: And you knew when you did these things
5 that what you were doing was illegal and wrong, yes?

6 THE DEFENDANT: Yes.

7 THE COURT: Very good.

8 Is there anything else regarding the factual portion
9 of the allocution that the government wishes the Court to
10 inquire about?

11 MR. GENTILE: Your Honor, I may have missed it at the
12 beginning, but I just want to make sure that defendant
13 allocuted to the fact that he agreed with others to sell the
14 heroin.

15 THE COURT: He did say that, but it's worth repeating.

16 So you previously indicated, in all the things you
17 have just described, it was part of an agreement between you
18 and others to distribute heroin, yes?

19 THE DEFENDANT: Yes.

20 THE COURT: Okay. Anything else?

21 MR. GENTILE: Nothing else. Thank you, Judge.

22 THE COURT: Anything from defense counsel?

23 MR. LIPTON: No, Judge.

24 THE COURT: And then Mr. Fontanez, in light of
25 everything we've now discussed, how do you now plead, first, to

MBA1FONP

1 the lesser included offense under Count Fourteen, guilty or not
2 guilty?

3 THE DEFENDANT: Guilty.

4 THE COURT: And then to the lesser included offense
5 under Count Fifteen, guilty or not guilty?

6 THE DEFENDANT: Guilty.

7 THE COURT: Because the defendant has acknowledged his
8 guilt as charged, because he has shown that he understands his
9 rights, and because his plea is entered knowingly and
10 voluntarily, and is supported by an independent basis in fact
11 containing each of the essential elements of the two offenses,
12 I accept his plea and adjudge him guilty of the lesser included
13 offenses within Counts Fourteen and Fifteen of Indictment
14 22 Cr. 192.

15 Now, Mr. Fontanez, the next stage in this process is
16 that the probation office will prepare what's called a
17 presentence report to assist me in determining sentence. And
18 as part of that, you'll be interviewed by the probation
19 officer. You can have your counsel present to advise you of
20 your rights, but under my practices, you personally need to
21 answer the questions put to you by the probation officer. Do
22 you understand that?

23 THE DEFENDANT: Yes.

24 THE COURT: After that report is in draft form but
25 before it's in final form, you and your counsel and also

MBA1FONP

1 government counsel will have a chance to review it and to offer
2 suggestions, corrections, and additions directly to the
3 probation officer, who will then prepare the report in final to
4 come to me.

5 Separate from that, counsel for both sides are hereby
6 given leave to submit directly to the Court in writing any and
7 all materials bearing on any aspect of sentence, provided those
8 materials are submitted no later than one week before sentence.
9 And we will put the sentence down for?

10 THE DEPUTY CLERK: Tuesday, February 14th, at 4.

11 THE COURT: Tuesday, February 14th, at 4.

12 MR. LIPTON: Your Honor, I'm going to be on trial with
13 Judge Ross in the Eastern District beginning February 6th for
14 approximately three weeks.

15 THE COURT: Yes, we can put it on afterwards. Also, I
16 think Valentine's Day is probably not the ideal date for a
17 sentence in any event. So let's look.

18 MR. LIPTON: Could we do a month later?

19 THE COURT: That would be the latest, so don't come
20 back and ask for more time after that.

21 THE DEPUTY CLERK: So Tuesday, March 14th, at 4?

22 THE COURT: March 14th at 4 p.m.

23 MR. LIPTON: Thank you, Judge.

24 THE COURT: All right. Anything else we need to take
25 up here?

MBA1FONP

1 MR. GENTILE: Your Honor, just two things. If the
2 Court could allocute the defendant on the provision of the plea
3 agreement in which he agreed not to bring a direct appeal or
4 collateral attack.

5 THE COURT: Yes. Thank you very much. I should have
6 done that. Thank you.

7 So I mentioned before, Mr. Fontanez, that this letter
8 agreement is not binding on me but is binding between you and
9 the government. Do you understand that?

10 THE DEFENDANT: Yes.

11 THE COURT: And part of your agreement with the
12 government is that if I sentence you to within the guidelines
13 or below the guidelines, you will not appeal or otherwise
14 attack your sentence. Do you understand?

15 THE DEFENDANT: Yes.

16 MR. GENTILE: And one other thing, Judge. To the
17 extent that the government would want to provide the Court with
18 video attached to its sentencing submission, how would the
19 Court want to accept that?

20 THE COURT: Yes, that's fine.

21 I should have also mentioned, is it likely that
22 Mr. Fontanez will be deported?

23 MR. GENTILE: I believe he is a citizen of the
24 Dominican Republic and he will be deported.

25 THE COURT: So Mr. Fontanez, you understand that as a

MBA1FONP

1 result of your guilty plea, you may well be deported? You
2 understand that, right?

3 THE DEFENDANT: Yes.

4 THE COURT: And you still want to plead guilty, yes?

5 THE DEFENDANT: Yes.

6 THE COURT: Very good. Okay.

7 MR. GENTILE: Thank you.

8 THE COURT: Anything from defense counsel?

9 MR. LIPTON: No, sir.

10 THE COURT: Very good.

11 All right. I think that concludes this matter. Thank
12 you all very much. I have another matter, so if you would
13 hurry out, we'll take up the other matter.

14 o0o